No. 17-1091

In the Supreme Court of the United States

TYSON TIMBS,

Petitioner,

v.

STATE OF INDIANA,

Respondent.

On Writ of Certiorari to the Supreme Court of Indiana

BRIEF FOR THE AMERICAN CIVIL RIGHTS UNION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

Whether the Eighth Amendment's Excessive Fines Clause is incorporated against the States under the Fourteenth Amendment.

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INTEREST OF *AMICUS CURIAE*[1]

The American Civil Rights Union (ACRU) is a nonpartisan 501(c)(3) nonprofit public-policy organization dedicated to protecting constitutional liberty. Incorporated in Washington, D.C., the ACRU is dedicated to promoting originalism: that in the United States' democratic republic, the only legitimate way for politically unaccountable federal judges to interpret the law is in accordance with the original public meaning of its terms. The ACRU Policy Board includes former Attorney General Edwin Meese III, as well former Assistant Attorneys General Charles J. Cooper and William Bradford Reynolds.

Here, the ACRU seeks to advance an originalist interpretation of the Fourteenth Amendment in two ways. First, provisions of the Bill of Rights that apply to the States do so through the Privileges or Immunities Clause. And second, continuing to incorporate federal rights into the Due Process Clause via substantive due process propagates a doctrine that has shown itself to be a wellspring of errant precedents that facilitate judicial intrusion into the purview of the elected branches of the federal government and the States.

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[1] *Amicus Curiae* American Civil Rights Union certifies that all parties have consented to the filing of this brief, and were timely notified. No party or counsel for any party authored this brief in whole or in part, and no person or entity other than the American Civil Rights Union contributed any money to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The American Civil Rights Union (ACRU) agrees that the Eighth Amendment's Excessive Fines Clause applies to the States, and offers supplemental arguments supporting that conclusion.

The Indiana Supreme Court should have weighed in on this. That court—like all courts—is bound by the Supreme Court's constitutional holdings. The Supreme Court has handed down numerous decisions relevant to the question in this case, and the Indiana court was obliged to follow those cases and render a decision.

Under this Court's decision in *Marks*, the current rule for decision is Justice Thomas's concurring opinion in *McDonald v. Chicago*, 561 U.S. 742 (2010). That decision is more narrow than the substantive due-process plurality opinion, as the former concerns the Privileges or Immunities Clause, which applies only to citizens, while the latter concerns the Due Process Clause, and therefore applies both to citizens and to noncitizens.

The Court could incorporate the Excessive Fines Clause without overruling the *Slaughter-House Cases*. Properly read, that 1873 case leaves open the possibility of including provisions from the Bill of Rights. The Court's 1876 *Cruikshank* decision, however, is squarely on point, and its reasoning has been repudiated by numerous subsequent cases, and it should accordingly be overruled.

Should this Court be unable to agree on a majority rationale, the law and the Nation would be better served by a fractured Court than to reaffirm substantive due process, as that doctrine has been the

source of needless controversy and confusion in the law.

ARGUMENT

Amicus American Civil Rights Union (ACRU) agrees that the Eighth Amendment's Excessive Fines Clause applies to the States. The ACRU also agrees with many—though not necessarily all—of the reasons Petitioner Timbs and various *amici* argue in support of incorporating the Clause to the States through the Fourteenth Amendment.[2] Rather than unnecessarily burden this Court by repeating arguments given by others with which the ACRU agrees or pointing out differences where it does not, the ACRU instead presents several supplemental and alternative points to inform the Court's analysis here.

I. THE INDIANA COURT WAS REQUIRED TO RULE ON THE FOURTEENTH AMENDMENT QUESTION.

The Supreme Court of Indiana had no choice but to definitely rule on the question of whether the Excessive Fines Clause applies to the States through the Fourteenth Amendment. The state court evidently felt free not to perform an incorporation analysis. The

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[2] As discussed elsewhere in this brief, the term incorporation technically refers to whether a substantive right is incorporated as a substantive element into the Fourteenth Amendment Due Process Clause. This brief clearly argues in favor of applying the Excessive Fines Clause to the States through the Privileges or Immunities Clause, but uses variations of the term "incorporate" as a shorthand term of art to applying provisions of the Bill of Rights to the States through any relevant provision of the Fourteenth Amendment.

court was mistaken, and did not fulfill its obligation as a lower court.

State courts generally have concurrent jurisdiction to decide federal issues. *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990). Unless Congress confines jurisdiction to the federal courts either explicitly or implicitly on a specific matter, state courts have full authority to interpret federal law. *Id.* at 459. There is no such impediment here. The Indiana judiciary had jurisdiction to decide the Eighth Amendment question presented by this case.

Even if the Indiana Supreme Court had the option of taking a pass on the question of incorporation, doing so turns the system of developing federal constitutional law on its head. This Court places "trust in lower judicial authority" as a safeguard against the "improvident exercise of [this Court's] discretionary jurisdiction." *California v. Carney*, 471 U.S. 386, 396–97 (1985) (Stevens, J., dissenting). As a matter of prudence, this Court vastly prefers a "fully percolated conflict" in the lower courts before taking up a question to resolve. *See id.* at 398 (internal quotation marks omitted). "Premature resolution of [a] novel question . . . stunt[s] the natural growth and refinement of alternative principles." *Id.* at 399. This Court as a general matter does not decide issues unless they have been developed by the lower courts and properly presented to this Court. *See Wisconsin v. Mitchell*, 508 U.S. 476, 481 n.2 (1993). Federal courts have a "virtually unflagging obligation . . . to exercise the jurisdiction given them," which is why abstention doctrines are invoked circumspectly. *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817

(1976). While state courts are not bound by all the principles that constrain the federal judiciary, the role of state courts in resolving federal constitutional questions is the same as the inferior federal courts, in either developing a consensus that may make the intervention of this Court unnecessary, or creating a court split that eventually calls for this Court to articulate a clear rule for the Nation. The Indiana Supreme Court abdicated that role and responsibility by deciding that it would not rule on a question properly before it, a matter possibly subject to later review by this Court, tasking this Court with acting first.

While judicial humility is refreshing when appropriate. But the Indiana Supreme Court had no option here; it was obligated to render a decision.

II. *Marks* Required the Supreme Court of Indiana to Incorporate through the Privileges or Immunities Clause.

The Constitution establishes a system of dual co-sovereigns, wherein both the government of the United States and the governments of the several States are both sovereign in their respective spheres of authority. *Alden v. Maine*, 527 U.S. 706, 713–14 (1999). State courts—including state supreme courts—are not bound to obey the inferior courts in the federal system. However, state courts must obey this Court on federal constitutional questions when this Court properly has jurisdiction over a matter. *See, e.g.*, *Am. Tradition P'ship, Inc. v. Bullock*, 567 U.S. 516, 516–17 (2012) (per curiam) (summarily reversing Montana Supreme Court's disregarding *Citizens United v. FEC*, 558 U.S. 310 (2010), in a campaign-finance case). This Court

does not give "guidance," which state supreme courts can elect to follow or not. It is instead the province of this Court to declare "what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

A. The Indiana Court should have performed a *Marks* analysis.

When this Court issues a fractured decision, lower courts must apply the analysis proscribed by *Marks v. United States*, 430 U.S. 188 (1977). "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgements on the narrowest grounds." *Id.* at 193 (internal quotation marks omitted).

The rule from *Marks* is notably underdeveloped. For example, often lower courts struggle to identify the "narrowest" opinion to cite as controlling. *See, e.g.*, *Hughes v. United States*, 138 S. Ct. 1765, 1771 (2018) (applying *Marks* to Supreme Court precedent on Federal Sentencing Guidelines). This can lead to confusion as to what to do when there are multiple opinions in a deeply fractured Court that provide multiple "narrow" opinions that can be combined with others to total a majority. Even Justices of this Court can disagree on which opinion is controlling. *See, e.g.*, *City of Ontario v. Quon*, 560 U.S. 746, 767 (2010) (Scalia, J., concurring in part and concurring in the judgment) ("There is room for reasonable debate as to which of the two approaches advocated by Justices whose votes supported the judgment in [a previous case]—the plurality's and mine—is controlling under [*Marks*].").

As another example, the Court has never explicitly determined for a rule binding upon lower courts under *Marks* how much precedential weight this Court should subsequently accord that case for purposes of stare decisis. The Court's consideration of Justice Powell's concurring opinion from *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), in *Grutter v. Bollinger*, 539 U.S. 306 (2003), and *Gratz v. Bollinger*, 539 U.S. 244 (2003), or the Court's recent consideration in *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876 (2018), of both Justice Blackmun's plurality opinion and Justice Scalia's concurring opinion in *Burson v. Freeman*, 504 U.S. 191 (1992), are examples of where such development would be helpful. While the Court's apparent methodology seems to suggest that the Court is free to work its will in subsequent cases when the rule of decision for the lower courts rested upon *Marks* rather than a majority opinion, lower courts—most notably here, the Indiana Supreme Court—would benefit from this Court's expounding further upon when and how to follow *Marks*.

Considering the intersection of *Marks* and stare decisis is hardly an academic conversation; it is central to this case. Lower courts need clear instruction as to which opinion from *McDonald v. City of Chi.*, 561 U.S. 742 (2010), is controlling, and here this Court must determine how much weight to give Justice Alito's plurality opinion and Justice Thomas's concurring opinion from that same case.

For purposes of inferior courts, the controlling opinion should be the one that supplied the necessary fifth vote to create a majority (when the Court is comprised of nine Members). Assume that there is a

three-Justice plurality opinion asserting a broad rule with elements A, B, C, and D. Justice 4 concurs in part, believing the rule should include elements A, B, and C. Justice 5 concurs more narrowly, advocating only elements A and B. Justice 6 concurs more narrowly still, embracing only element A, and specifically rejecting B, C, and D. Justice 7 concurs in the judgment only, rejecting elements A, B, C, and D, and instead insists that element E should control, with element E being clearly narrower in scope that any of the elements (A, B, C, and D) embraced in the other opinions. The remaining two Justices dissent. Under this hypothetical, the controlling opinion should be that of Justice 5, meaning that the rule for lower courts consists of elements A and B. Two Justices had narrower opinions and their votes formed part of the judgment of the Court, but the narrowness of their opinions should not constrain lower courts, because a rationale of elements A and B garnered the support of the majority of the Court. Their votes were superfluous, and should not constrain what can in some respects be considered essentially a 5-4 decision of the Court. In a sense, after the votes for the broadest opinion is tallied, and the Court continues to add votes in order of breadth, the controlling opinion should be the "broadest" narrow opinion that crosses the threshold to create a majority rationale.

For purposes of this Court when deciding subsequent cases, each of the opinions of the fractured Court should be persuasive authority only—to the extent that any of them persuade—with no precedential weight given to any. Specifically, the Court should be wary of assertions of reliance interests, which are often part of a stare decisis analysis. *See,*

e.g., *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2484 (2018) (overruling *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977)). Take for example Justice Breyer's concurrence in *Van Orden v. Perry*, 545 U.S. 677 (2005). Justice Breyer declined to join any part of Chief Justice Rehnquist's plurality opinion for four Justices, instead positing that in "borderline cases" invoking the Establishment Clause, courts should reject any formulaic test or objective standard, relying instead upon the judge's sound "legal judgment." *Id.* at 700 (Breyer, J., concurring in the judgment). In many circuits (though not all),[3] this "legal judgment" approach is relied upon by state actors displaying the Ten Commandments and sometimes other religious displays as well. Those state actors have no choice but to rely upon what a single Justice wrote, but that "reliance" should not be mistaken as a justification for deferring to that single-Justice approach. As the Court considers how to clarify *Marks*, it should also clarify the weight given to previous decisions following *Marks*.

B. Under *Marks*, Justice Thomas's concurring opinion in *McDonald* controls here.

The Bill of Rights "originally applied only to the Federal Government." *McDonald*, 561 U.S. at 754 (discussing *Barron ex rel. Tiernan v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243, 247 (1833), and *Lessee*

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[3] There is actually a circuit split regarding the rule of decision that courts should follow for displays containing religious content, as discussed in a case currently petitioning for the Court's review. *See* Petition for a Writ of Certiorari at i, *American Legion v. American Humanist Ass'n* (No. 17-1717).

of Livingston v. Moore, 32 U.S. (7 Pet.) 469, 551–52 (1833)). "The constitutional Amendments adopted in the aftermath of the Civil War fundamentally altered our country's federal system." *Id.* The Privileges or Immunities Clause of the Fourteenth Amendment provides States may not abridge "the privileges or immunities of citizens of the United States," U.S. CONST. amend. XIV, § 1, cl. 2, while the Due Process Clause of the same Amendment provides that no State may deprive "any person of life, liberty, or property, without due process of law," *id.* § 1, cl. 3.

The part of *McDonald* joined by five Justices is a majority opinion that is of course controlling as a precedent of the Court. Other parts of the opinion are a four-Justice plurality authored by Justice Alito, incorporating the Second Amendment's right to bear arms into the Fourteenth Amendment's Due Process Clause via substantive due process. *McDonald*, 561 U.S. at 791. Justice Thomas wrote separately that the right to bear arms applies to the States through the Privileges or Immunities Clause. *Id.* at 806 (Thomas, J., concurring in part and concurring in the judgment).

Justice Thomas's opinion is the more narrow one, and therefore controlling under *Marks*. Recent Census Bureau estimates are that there are 326 million persons currently residing in the United States. U.S. Census Bureau, Quick Facts, July 1, 2017, https://www.census.gov/quickfacts/fact/table/US/PST045217 (last visited Sept. 11, 2018). Although the most recent census did not ask whether each person is a citizen, an informal survey of the recent estimates show a consensus that there are perhaps approximately 40 million aliens (both those here legally

and those who are not) currently in the Nation. *See, e.g.*, Simran Khosla, *GlobalPost*, Jan. 17, 2015, *reproduced by Business Insider*, *available at* https://www.businessinsider.com/map-of-how-many-foreigners-in-each-us-state-2015-1 (last visited Sept. 11, 2018) (citing sources estimating 41.6 million noncitizens inside the United States).

Taking those numbers as rough estimates, that would mean that Justice Alito's opinion recognizes a right that can be claimed by 326 million persons, while Justice Thomas's opinion recognizes a right that can be claimed by approximately 286 million persons. Not only that, but—as explained later in this brief—Justice Alito's opinion brings to bear a doctrine that is sweeping in its breadth in comparison to a doctrine that—at least at the moment—seems much narrower in its application.

While courts may be much more familiar with substantive due process than with the privileges or immunities of U.S. citizens, nowhere does *Marks* say that familiarity with a doctrine or the likelihood that it will appear on a bar exam is a factor in determining which opinion to follow when looking to a fractured Supreme Court decision. Justice Thomas's opinion is the narrowest that supplies the fifth vote in *McDonald*, and therefore should have been followed by the Indiana Supreme Court.

III. THE COURT CAN INCORPORATE THROUGH THE PRIVILEGES OR IMMUNITIES CLAUSE WITHOUT OVERRULING *SLAUGHTER-HOUSE*.

It is not necessary for this Court to overrule the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873), to incorporate the Excessive Fines Clause to the States. *Slaughter-House* was a case involving butchers claiming an unenumerated constitutional right of an economic nature that would supersede a local law in Louisiana restricting the slaughtering of animals within urban areas. *Id.* at 60. It could be construed a case governing unenumerated rights (i.e., implied rights), rather than comprehensively addressing the incorporation of provisions from the Bill of Rights.

Slaughter-House held that the Privileges or Immunities Clause protects only rights that "owe their existence to the Federal government, its National character, its Constitution, or its laws." *Id.* at 79. For instance, *Slaughter-House* opined in dictum that the Privileges or Immunities Clause protected the right "to come to the seat of government to assert any claim [a U.S. citizen] may have upon that government." *Id.* at 79. However, that passage references an enumerated right from the Bill of Rights: the First Amendment right to "petition the Government for a redress of grievances." U.S. CONST. amend. I, cl. 6. The Court goes on to also reference habeas corpus and peaceable assembly as rights that could reach the States through the Clause. *Slaughter-House*, 83 U.S. (16 Wall.) at 79.

In other words, *Slaughter-House* holds the Privileges or Immunities Clause protects only rights that inhere in federal citizenship. Kenneth A. Klukowski, *Citizen Gun Rights: Incorporating the*

Second Amendment Through the Privileges or Immunities Clause, 39 N.M. L. Rev. 195, 227 (2009). It is true that the dissenting Justices in *Slaughter-House* criticized the majority's narrow reading for rendering the Privileges or Immunities Clause to "a vain and idle enactment, which accomplished nothing, and most unnecessarily excited Congress and the people to its passage." *Slaughter-House*, 83 U.S. (16 Wall.) at 96 (Field, J., dissenting). But that claim is inaccurate.

Statements even from some dissenting Justices in *Slaughter-House* suggest that it could be read as a disagreement over unenumerated rights (i.e., implied rights) rather than which enumerated rights apply to the States. For example, "we are not bound to resort to *implication* . . . to find an authoritative declaration of some of the most important privileges and immunities of citizens of the United States," Justice Bradley insisted. *Id.* at 118 (Bradley, J., dissenting) (emphasis added). "It is in the Constitution itself." *Id.* Although Justice Bradley went on to say he would recognize at least some unenumerated rights in the Clause, *id.* at 119, the gravamen of the Court's disagreement in *Slaughter-House* was over implied rights, and did not foreclose provisions of the Bill of Rights extending to the States. *Slaughter-House* "arguably left open the possibility that certain individual rights enumerated in the Constitution could be considered privileges or immunities of federal citizenship." *McDonald*, 561 U.S. at 808 (Thomas, J., concurring in part and con[illegible]ring in the judgment).

This Court therefore need not disturb *Slaughter-House* to apply the Excessive Fines Clause to the States through the Privileges or Immunities Clause.

IV. THE COURT MUST OVERRULE *CRUIKSHANK* TO INCORPORATE THROUGH THE PRIVILEGES OR IMMUNITIES CLAUSE, AND SHOULD DO SO.

The same cannot be said for *United States v. Cruikshank*, 92 U.S. 542 (1876). There, the Court held that the Assembly Clause of the First Amendment and the right to bear arms in the Second Amendment do not apply to the States through the Privileges or Immunities Clause. *Id.* at 552–53. *Cruikshank* reasoned that an enumerated right found in the Constitution does not extend to the States through the Privileges or Immunities Clause if the right is not "in any manner dependent upon that instrument for its existence." *Id.* at 553. "In other words, the reason the Framers codified the right to bear arms in the Second Amendment—its nature as an inalienable right that pre-existed the Constitution's adoption—was the very reason citizens could not enforce it against States through the Fourteenth." *McDonald*, 561 U.S. at 809 (Thomas, J., concurring in part and concurring in the judgment).

Cruikshank should be overruled. First, numerous enumerated rights in the Constitution have subsequently been extended to the States. *See, e.g.*, *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (free exercise of religion); *Gitlow v. New York*, 268 U.S. 652 (1925) (free speech). That case speaks broadly about whether the Fourteenth Amendment mandates extending those rights against the States, not clearly disclaiming whether other provisions of the Fourteenth Amendment could accomplish the same result. Second, the two rights at issue in *Cruikshank*—assembly and bearing arms, both of which pre-existed the

Constitution—have been subsequently applied to the States. The Court incorporated the Assembly Clause in *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937). The *De Jonge* Court quoted *Cruikshank*, noting with approval only its declaration, "The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances." *Id.* (quoting *Cruikshank*, 92 U.S. at 552) (internal quotation marks omitted). But *Cruikshank* then did not extend that right to apply against States, despite the fact that the Constitution commands that every State have a republican form of government. U.S. CONST. art. IV, § 4. And of course, the Court's recent decision in *McDonald* was a broad-based repudiation of whether the pre-existing right to self-defense should apply to the States through the Fourteenth Amendment. Much of what has transpired in the law since 1876 is irreconcilable with *Cruikshank*.

One key aspect of stare decisis is "whether the decision was well-reasoned." *Montejo v. Louisiana*, 556 U.S. 778, 792–93 (2009). *Slaughter-House* held that the Privileges or Immunities Clause protects rights that are inherent in federal citizenship, and then left open the possibility that those rights include provisions of the Bill of Rights that could apply against the States. *Cruikshank* seems to track the first part of *Slaughter-House* by referring to the relevant Clauses as containing "an attribute of national citizenship," *Cruikshank*, 92 U.S. at 552, but then rejecting the idea that such rights could be actionable against the States. The reasoning of *Cruikshank* has long since been jettisoned by this Court, and its conclusions reversed.

It remains an anachronistic anomaly in constitutional law. It should be explicitly overruled.

V. A FRACTURED COURT WOULD SERVE THE LAW BETTER THAN INCORPORATION THROUGH SUBSTANTIVE DUE PROCESS.

Should a majority of this Court be unable to reach majority consensus on a rationale for applying the Excessive Fines Clause to the States through the Fourteenth Amendment, then it should follow the example of *McDonald*, and leave the question resolved, rather than reaffirm substantive due process with a majority opinion. The Court's long and winding path from substantive due process is one better left alone, instead of perpetuated.

In 1897, the Court incorporated the Taking Clause into the Due Process Clause because it was "a principle of natural equity, recognized by all temperate and civilized governments, from a deep and universal sense of its justice." *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226 (1897). When denying incorporation of the Self-Incrimination Clause a decade later, the Court looked to "immutable principles of justice which inhere in the very idea of free government which no member of the Union may ignore. *Twining v. New Jersey*, 211 U.S. 78, 102 (1908) (internal quotation marks omitted). A quarter-century later, the Court considered whether the right was "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Synder v. Massachusetts*, 291 U.S. 97, 105 (1934). For years after that, the Court in *Palko* articulated the test of whether the right is "implicit in the concept of ordered liberty." *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

But the test continued to shift and morph. In *Duncan*, the Court incorporated the Sixth Amendment's Jury Trial Clause, holding that the question is whether a right is "fundamental to an American scheme of justice," *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968). Duncan elaborated that the test for whether a right is fundamental is "whether . . . a procedure is necessary to an Anglo-American regime of ordered liberty." *Id.* at 149 n.14. The following year, the Court applied the *Duncan* test again, and held, "Insofar as it is inconsistent with this holding, *Palko v. Connecticut* is overruled." *Benton v. Maryland*, 395 U.S. 784, 794 (1969).

Benton's rejection of *Palko* is not as straightforward as it might appear. Both cases involved the Double Jeopardy Clause. *Palko* rejected incorporation, 302 U.S. at 328, but *Benton* went the opposite way, incorporating the Clause, 395 U.S. at 796. The *Benton* Court's discussion of the *Palko* framework suggested a repudiation of *Palko*'s rule, reasoning, "*Palko* represents an approach to basic constitutional rights which this Court's recent decisions have rejected." *Id.* at 794. The caveat "insofar" in *Benton*'s sentence overruling *Palko* thus left unanswered whether the Court was overruling *Palko*'s holding that the Double Jeopardy Clause did not apply to the States through the Fourteenth Amendment Due Process Clause, or whether *Benton* was also overruling *Palko*'s test.

The judiciary's best guess on what this Court did about *Palko* in the 1960s was that the "Supreme Court ultimately abandoned this abstract enterprise in favor of a more concretely historical one." *Nordyke v. King*, 563 F.3d 439, 449 (9th Cir. 2009), *vacated en banc on*

other grounds, 611 F.3d 1015 (2010). Judge O'Scannlain continued in his panel opinion, "In *Duncan*, the Court recognized that it had jettisoned the metaphysical musings of *Palko* for an analysis grounded in the 'actual systems bearing virtually every characteristic of the common-law system that had been developing contemporaneously in England and in this country.'" *Nordyke*, 563 F.3d at 449 (quoting *Duncan*, 391 U.S. at 149 n.14).

However, this confusion regarding the proper test was compounded in 1997, when the Court decades later considered whether the Constitution includes an unenumerated right to physician-assisted suicide in *Washington v. Glucksberg*, 521 U.S. 702 (1997). The Court recurred in part to *Palko*, holding that there was no such right because it failed a two-pronged test, that "fundamental rights" are both "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." *Id.* at 720–21 (quoting *Moore v. E. Cleveland*, 431 U.S. 494, 503 (1977) (opinion of Powell, J.), and *Palko*, 302 U.S. at 325) (internal quotation marks omitted). The Ninth Circuit held that it must be "[g]uided by both *Duncan* and *Glucksberg*," *Nordyke*, 563 F.3d at 451, notwithstanding that *Duncan* had supposedly rejected a test that was later resuscitated in *Glucksberg*, seeming to suggest that the latter's reference to "history and tradition" anchored *Palko*'s "metaphysical musings" into a more objective framework.

The Court revisited fundamental-rights jurisprudence in *McDonald*, deciding whether the Second Amendment right to bear arms recognized in *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008),

applied to the States through the Fourteenth Amendment. The question was typified in nations like Japan, which all parties acknowledged were free countries, but where there is no right to bear arms, and firearm ownership is severely restricted. *See McDonald*, 561 U.S. at 781 (opinion of Alito, J.).

The Court cleaned up aspects of fundamental-rights jurisprudence in *McDonald*. Justice Alito wrote for the majority that the test is "whether the right . . . is fundamental to *our* scheme of ordered liberty," citing *Duncan*, or—apparently as a restatement of that test—"whether this right is deeply rooted in this Nation's history and tradition," *id.* at 767 (internal quotation marks omitted), citing *Glucksberg*. In sum, if a right is deeply rooted in the history and tradition of the United States, that shows it to be part of an Anglo-American regime of ordered liberty, and thus fundamental to our scheme of ordered liberty.

But while concurring with the conclusion that the right to bear arms applies to the States through the Fourteenth Amendment, and is "fundamental" as the Court's precedents defined that term, Justice Thomas declined to join the other four Justices who voted to reverse the lower court in the parts of the opinion employing substantive due process. *Id.* at 805–06 (Thomas, J., concurring in part and concurring in the judgment). "Instead, the right to keep and bear arms is a privilege of American citizenship that applies to the States through the Fourteenth Amendment's Privileges or Immunities Clause." *Id.* at 806.

CONCLUSION

The judgment of the Supreme Court of Indiana should be reversed, and the case remanded for application of the Excessive Fines Clause.

Respectfully submitted,

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